

Douglas K. Strickling (ISB No. 3230)
BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500—83701
150 North Capitol Boulevard
Boise, Idaho 83702
Tel: 208.384.3870
Fax: 208.384.4454
dstrickling@cityofboise.org

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT)	
APPLICATION OF UNITED WATER IDAHO,)	CASE NO. UWI-W-15-02
INC. AND THE CITY OF BOISE, IDAHO FOR)	
APPROVAL OF AN AGREEMENT FOR)	CITY OF BOISE GENERAL
REPLACEMENT AND OPERATION OF FIRE)	COMMENTS AND REPLY TO
HYDRANTS AND RELATED RATE MAKING)	COMMENTS OF THE
TREATMENT.)	COMMISSION STAFF
)	
)	

The City of Boise City, by and through its attorney of record, Douglas K. Strickling, hereby provides the following General Comments and Reply in Response to the Comments of the Commission Staff.

Background:

On July 15, 2014, the City of Boise City ("Boise" or "City") entered into a negotiated Agreement (the "Agreement") with United Water Idaho, Inc. ("United Water" or "UWI") providing for the transfer from the City to UWI of ownership, maintenance and replacement responsibilities for approximately 6,700 fire hydrants located within Boise. United Water owns and operates a potable water system which provides service to water users located both within and without the City. UWI owns the water system hydrants located outside the City limits but does not own the water system hydrants located within the City. Those hydrants, for a reason neither the City nor UWI can historically determine, are currently owned and maintained by the City. The Agreement to transfer the hydrants was approved unanimously by the Boise City Council and signed by the Mayor.

GENERAL COMMENT AND REPLY TO STAFF
COMMENTS

On April 10, 2015, United Water and Boise, filed a joint Application ("Application") seeking Commission approval of the terms of the Agreement allowing for the gradual transfer of the operation, maintenance and replacement of the hydrants located within the City over a forty (40) year period and seeking permission for UWI to recover the increased costs associated with the transfer from UWI ratepayers. Commission approval of the Agreement and UWI's requested cost accounting treatment are conditions precedent to consummation of the hydrant transfer.

On May 12, 2015, the Commission issued a Notice of Order and Notice of Application requesting public comment on the filed Application. On June 2, 2015, the Commission Staff took the additional step of issuing a press release notifying the public of the filed application and the opportunity to comment on the application. The press release contents were reported in the Idaho Statesman. Only one (1) comment was received. The comment came from a member of the public who indicated support for ownership of hydrants by United Water but disagreement with the cost recovery mechanism.

During the pendency of the Application Boise and UWI provided detailed responses to Discovery Production Requests of the Commission Staff ("Staff"). Commission Staff Comments were filed on July 23, 2015.

General Comments:

The Agreement is based on the fundamental premise that hydrants are an integral part of a water system and the ownership, operation and maintenance of hydrants by the water service provider provides for a more efficient system from both a water system maintenance and a fire protection perspective. United Water, the Boise Fire Department and the Boise Public Works Department, who each possess relevant expertise in this area, agree with this fundamental premise. United Water, within the corporate boundaries of Boise, does not own, operate or maintain hydrants. To the best of Boise and UWI's knowledge, UWI is the only municipal water service provider in the State of Idaho that does not own, operate and maintain all fire hydrants within their corporate or certified boundaries. UWI does own, operate and maintain all hydrants located within its

certified area outside the corporate boundaries of the City of Boise. This bifurcated hydrant system in Boise creates issues from an operational standpoint.

The Agreement is also based on the premise that users of the water system should equitably pay for the costs of operation, maintenance, and replacement of all elements of that system. All providers of municipal water service in the State of Idaho, including UWI in its certified area outside of Boise, recover the costs of owning, maintaining and replacing fire hydrants through water customer charges. Boise citizen ratepayers are treated differently. These Boise citizen ratepayers are paying the costs of UWI's ownership, maintenance and replacement of hydrants located outside the City limits through customer service charges while also paying the costs associated with Boise's ownership and the maintenance of hydrants through General Fund tax revenues. UWI ratepayers located outside of Boise do not currently share in the cost of maintaining and replacing hydrants located within the City.

Boise and UWI, through the Agreement, have established a mechanism to correct the past practice of separating ownership of hydrants from the water service provider, to correct the maintenance and fire protection inefficiencies associated with this past practice and to address the cost recovery inequities over a gradual period with minimal impact to Boise citizen ratepayers and UWI ratepayers located outside the City. The Agreement has the unanimous approval of the Boise Mayor and City Council, who believes the Agreement represents the best interest of the citizens of Boise including United Water Boise citizen ratepayers. The City will continue to fund the operation and maintenance of the hydrants until they are transferred. The minimal cost to the ratepayers will be offset by enhanced operational and fire protection services. In addition, the gradual release of Boise funds used to maintain and replace fire hydrants may be used to enhance fire service and/or other municipal services needed and utilized by the Boise citizen ratepayers.

Reply to Staff Comments:

Rationale for Agreement

While Staff's ultimate recommendation is to disapprove the Agreement terms, it appears that Staff has no dispute with the fundamental assumptions set forth above. The City believes that

compelling information was provided to support the rationale of the Agreement, from both a utility basis and even more broadly at a community level. Boise understands that Staff has a narrow focus on the cost to ratepayers, yet is apparently unconcerned by the current inconsistency where Boise citizen ratepayers subsidize hydrant ownership, maintenance and replacement outside of the City.

The Application and Agreement indicates that Boise leadership from the Mayor and Council to the Fire Department believes it is in the Boise citizens and Boise UWI customers' best interests to transfer ownership, operation, and maintenance of these City-owned hydrants to United Water. The transfer is occurring over 40 years to ensure a modest impact on customer rates and to allow United Water to gradually accept these assets in a way that minimizes liability to the company and ensures funding for hydrant maintenance, operation and replacement.

1. Operation of hydrants within Boise City should be consistent with other communities in the state.

Staff makes the statement that "Boise will stand out as one of the only cities in the State to not own its own hydrants." (Staff Comment p. 3) However, as the Staff comments also point out, Boise is unique among Idaho cities in that it does not own its municipal water system. The core issue has little to do with whether a private company or a municipality owns fire hydrants. It is about Boise's system being split between the two, which has created an operational model that is fundamentally flawed and unnecessarily inefficient. United Water and Boise have recognized this systemic flaw and, through the Agreement, have established a fair and responsible mechanism to remedy it.

To clarify an issue for Staff and the Commission, Boise would very much like to own and operate the entire water system located within Boise's corporate limits. The lack of ownership and control of the water serving Boise citizens has created numerous governance issues and lost opportunities for which franchise fees only partially compensate. Boise also recognizes that the gradual release of hydrant ownership to UWI means there will be additional assets to purchase when and if the time comes for Boise to purchase the water system. However, Boise has determined, through its the Mayor, Council and Fire Department, that ownership and operation

of hydrants by UWI, as Boise's current water service provider, is the most efficient and safe way to provide water service and fire protection to its citizens and citizen ratepayers.

2. **There should be equity among ratepayers and taxpayers.**

Staff asserts the "City contends that it would be more equitable for all water users to pay for the fire hydrants, which would occur under United Water ownership." (Staff Comments p. 3) This is not a contention, but a fact. All the other systems in Idaho recover costs for hydrants in their water rates. UWI recovers its costs for hydrants in its water rates for hydrants operated outside of the City. No other Idaho city relies on franchise fees or taxes to finance the maintenance and replacement of hydrants. It is equitable that Boise residents pay for fire hydrants-an essential portion of the water system-through their water rates. It is for this reason that Boise supports UWI's request to include the hydrant replacements in their rates.

Staff argues that the proportionate amounts each customer pays could be substantially changed as a result of the transfer of ownership. The comments go on to lay out two "extreme" scenarios. The City disputes that these scenarios are probable or that rate disparity issues can be attributed to the Agreement. Any rate system that is based on averages and reasonable assumptions will generate extreme scenarios where charges are arguably disproportionate to the services received. These scenarios are not the result of the transfer of Boise hydrant assets to United Water. They are simply a function of the existing rate system methodology.

One area Staff fails to address is the inequity of Boise citizen ratepayers supporting, in their rates, the ownership, operation and maintenance of UWI hydrants located outside City boundaries without the reciprocal support of the outside ratepayers paying for hydrants within the City. The transfer of the hydrants to United Water will remedy this inequity and allow the entire United Water system to be operated as an integrated system and for the ratepayers to share equally in benefits provided by that integrated system.

Finally, Staff's Comments ask the Commission, in essence, to review Boise's municipal budgeting and the expenditure of tax and franchise fee receipts. This is an area the legislature (see Idaho Code § 61-1040 which specifically excludes municipal corporations from IPUC

regulation) and Courts (see *Alpert v. Boise Water Corporation* 795 P. 2d 298 (Idaho 1990) and *ACHD v. IPUC* 151 Idaho 1 (2010)) indicate are beyond the scope of the Commission's authority. In *Alpert*, a case which specifically addressed the franchise fees paid by United Water to Boise City, the Idaho Supreme Court held the IPUC had limited jurisdiction and stated:

"In the complaint filed by the plaintiffs the district court was requested to determine the validity of the franchise contracts between utilities and the cities. The district court was also requested to determine the authority of the cities to grant a utility franchise, the validity of the franchise fee and the authority of the city to impose a franchise fee.

The subject matter of the complaint filed in district court clearly raises legal issues to be resolved by the courts rather than an administrative agency. The action filed in district court does not deal with the subject matter traditionally regulated by the public utility commissions and does not fall into a category of regulation that requires the technical expertise of a public utility commission."

795 P.2d at 302. The City asks that the Commission, when reviewing Staff's Comments, recognize its lack of authority in regulating the expenditure of funds by the City and adhere to the holding in *Alpert*. The City would also ask the Commission to respect and defer to the broad authority and judgment of local elected officials in the collection and expenditure of legally collected franchise fees and tax revenue.

Staff states the "the franchise fees paid by all United Water customers within City limits is more than 2.5 times the City's budget for maintaining and replacing hydrants". (Staff Comments p. 4) Implied in this statement is that the City should earmark these funds for hydrants. The City could do so. The City could also earmark franchise fees for payment toward other water utility related items in the Fire Department's projected Fiscal Year 2015 budget of \$44,770,730 or water utility related items in the City's overall General fund budget of \$203,253,593 (see Response to Production Request No. 7, City of Boise FY 2015 Budget Update p. 8-9). To expand on Staff's suggestions, the City could also begin earmarking Idaho Power fees for electric-related purposes such as light bulb replacements and earmark Intermountain Gas fees for boiler replacements. However, what Staff is asking the Commission to do, in reviewing the City expenditure of franchise fees and General Fund revenues for specific items, such as hydrant maintenance and replacement in this case, is unwarranted and unnecessary and would add an administratively burdensome step to the already extensive public budgeting process. The use and expenditure of franchise fees are not restricted or limited by Idaho Code § 50-329(A). In

compliance with State Code and reasonable accounting practices the City uses franchise fees in conjunction with tax and other General Fund revenues to cover the expenses of the City. The Commission should refuse to engage in municipal oversight and legislative matters which, Staff, contrary to law and practical application, recommends.

3. The Agreement may make available capital funding for fire protection infrastructure and other essential services which is a benefit to Boise citizen ratepayers.

Staff states that it is “beyond dispute that one of the City’s primary motives for proposing ownership transfer is to free-up funds currently used for hydrant maintenance/replacement and use these funds for other purposes in the future.” (Staff Comments p. 5) Boise disagrees. The primary motive for the City proposing transfer is to provide a more efficient and effective water and fire protection system. Another primary motive is to have an equitable system where hydrant maintenance and replacement costs are allocated to water ratepayers as is done in every other system in Idaho. The Agreement would have the incidental, and positive, effect of freeing-up General Fund monies which could be used for tax relief or to pay for unfunded needs of the Fire Department or to pay for unfunded General Fund needs which will provide a benefit to UWI ratepayers who are also Boise citizens. As discussed previously, the use of those funds is within the sound discretion of the Boise City Council as contemplated by the laws governing municipal corporations.

Staff describes the reallocation of General Fund monies (including franchise fees and tax receipts) formerly allocated to hydrant maintenance, operation and replacements as a “windfall” to Boise. (Staff Comments p. 5) This is inaccurate and inappropriate for several reasons. First, UWI Boise ratepayers have long enjoyed the benefits of hydrant maintenance and replacements that they do not pay for in their rates, a rate break that is not enjoyed by almost all other ratepayers in the State who do pay for municipal hydrants in their rates. Boise and UWI are not seeking to recover for these past benefits. However, there is no reason to continue to perpetuate this bifurcated system and inequitable funding mechanism. Second, the statement presumes that the City’s budget is without constraints. This presumption is incorrect. Fire stations, fire equipment, police services, parks, and libraries have been, or are, on hold awaiting further General Fund budget resources. Third, Staff fails to acknowledge the fact that the vast majority

of the United Water customers impacted, and we believe benefitted, by the hydrant transfer are Boise citizens. The elected officials of Boise, who have approved the Agreement, are directly accountable to the Boise rate payers and the Boise taxpayers impacted and benefitted by the Agreement. Finally, Boise will continue to pay for hydrant operation and maintenance costs for the next 40 years. Hydrant ownership will be transferred only after the useful life of the hydrant is reached. While it would have been the City's preference to immediately transfer ownership of all hydrants to UWI, the City recognizes it could potentially have an immediate and sizeable impact on UWI ratepayers and is not the desire of United Water. The gradual transfer will allow for a minimal impact on rates commensurate with the benefits received from being served by an integrated system.

4. **The Agreement expresses the intent of the parties to the franchise agreement.**

Staff indicates that the current franchise agreement does not specifically address the issue of hydrant ownership and the parties can express their intent clearly in a new franchise agreement. (Staff Comments p. 4-5) UWI and Boise have entered into the hydrant transfer Agreement to clearly express their intent regarding hydrant ownership and the expectations regarding the provision of fire protection service required by the franchise agreement and IDAPA regulations. The Agreement states that the City will no longer accept new hydrant ownership from United Water and will transfer the existing City-owned hydrants to United Water over a 40-year period. The key elements of this clarified intent will be carried over into the franchise agreement currently being negotiated.

5. **Ownership of the hydrants should reside with the entity that owns the infrastructure connected to the hydrants and has the greater experience and expertise to maintain them.**

Staff states "It may be desirable for the entity that owns the hydrants to also own the infrastructure connected to them in order to ensure that they can deliver sufficient fire flows in an emergency." (Staff Comments p. 6) Boise agrees. Boise also agrees with the Staff comment that hydrants are an "extremely critical component of nearly every water system" (Staff Comments p. 6) and with the sole member of the public to comment who discussed the importance of hydrants to the over-all water system. However, Boise disagrees with the Staff

minimization of the importance of creating a better and more efficient level of fire protection for Boise City. Boise believes the Commission should support a better and more efficient level of fire protection. Boise sees this result being achieved through the United Water's application of expertise on common maintenance practices; location and maintenance tracking systems; contract preparation and bid processes; and up-to-date knowledge of industry practices and standards to ensure the system can be operated and maintained in a more efficient manner.

Boise agrees with Staff that a Class III fire rating is likely to be maintained, at least in the near future, no matter who owns the hydrants. The key point to the Agreement, however, is to assure that this Class III rating can be maintained more efficiently at minimal cost to the ratepayers. Boise can assure the Commission that the operational aspects of the Agreement were thoroughly vetted by the Boise Fire Department who supports it. The City would not have entered into an Agreement if there was any concern that citizens would have been put at risk.

6. The budgeting and expenditure of municipal Franchise Fees and Taxes are beyond the scope of the Commission's authority and not relevant to this Application.

Staff cites Idaho Code § 50-329(A) (1) (a) for the proposition that franchise fees be used "in lieu of payment of any tax or fee imposed by the City for the installation, maintenance and removal of hydrants." (Staff Comments p. 7-8) This provision of state law prohibits the city from charging UWI for using City rights-of-ways and property for accessing, installing and maintaining fire hydrants. The City certainly acknowledges this restriction and does not impose or collect any fee from United Water for the installation, maintenance or removal of hydrants in the City and will not do so as hydrants are transferred. The City fully complies with all the requirements set forth in the cited Code section and will continue to do so in the future.

Commission Staff seems to interpret § 50-329(A)(1) to stand for the proposition that UWI franchise fees are paid, in part, as compensation to the City for City maintenance and ownership of fire hydrants and, therefore, any change in hydrant maintenance must be accounted for through franchise fee adjustment. This interpretation is wrong.

The City is authorized by Idaho Code § 50-329(A) to collect franchise fees from public service providers franchised by the City. The fees, which are limited to 3% of gross revenues received by the public service provider within the City, are paid by the public service to the city in quarterly installments. Franchise fees paid by a public service provider are then collected by the public service provider from its customers within the City. (Idaho Code § 50-329(A)(b)). There is no restriction in the code on how those franchise fees are budgeted and expended by the City. In practice the franchise fees collected from UWI are combined with other franchise fees, tax receipts and other City revenues and placed in a General Fund to fund a variety of City services including Fire Department personnel and equipment, Police and Parks. The City has been collecting franchise fees in one form or another from United Water and its predecessors since 1938 (see Boise's Water The Private Side of Public Works by Robert T. Kent and Boise State University (2007)).

Franchise fees are collected as general compensation to the City for, amongst other things, allowing United Water to utilize public property and rights of way for the location of its facilities, as payment in lieu of paying other fees which could be assessed by the City (see Idaho Code § 50-329(A)), as payment for being free from competition from other similar service providers and for providing a service which the City has the exclusive right to provide. The legality of specific franchise fees assessed by Boise to UWI was upheld in the case of *Alpert v. Boise Water Corporation* which held the following:

“B. Franchise Fee. The practice of charging franchise fees as consideration for granting of a franchise was first noted in *Boise City v. Idaho Power Co.*, 37 Idaho 798, 220 P. 483 (1923), which involved the issue of cancellation of a franchise contract where Idaho Power has purchased two competing power plants and sought to consolidate the franchises. As consideration for the granting of the franchise, Boise City had charged a percentage of the utility's gross revenue collected from its Boise patrons. The Court held that the Commission had no authority to invalidate the franchise cancellation agreement entered into between Boise city and Idaho Power, and further held that the payments from the utility to the city constituted valid consideration for a valuable property right which the city surrendered.

It is well established that Idaho cities have the right to own and operate utilities and provide those services to their residents. The cities contend that their surrender of this right is valid consideration for the franchise fee charged to the utilities. We agree. The franchise agreements in the present case are contracts and the franchise fees are

simply payments or consideration for the rights granted by the cities to the utilities. Idaho Const. ar. 15, section 2; I.C. 40-2308”.

Staff's comments regarding the collection and expenditure of franchise fees by the City, asks the Commission to ignore the clear decision set forth in *Alpert* and regulate the assessment of franchise fees. Staff is also asking the Commission to effectively rewrite Idaho Code 50-329(A) to allow the Commission to regulate the City's expenditure of franchise fees collected from United Water. The Commission has no authority to do so.

Staff asserts that it “does not believe it should be the responsibility of United Water customers to fund the city's services for fire, police, library and parks.” The City does not collect fees from United Water customers to fund City services. However, Idaho Code 50-329(A) (b) clearly requires UWI's franchise fee obligation to be passed on by UWI to its customers. In doing so, the legislature has determined that UWI customers can indirectly pay for the City services funded by franchise fees. Staff apparently disagrees with this legislatively determined process and is asking the Commission to rewrite the Code to prohibit the collection of franchise fees paid by the customer when the franchise fees may be used by the City to fund services, benefitting Boise citizen ratepayers and taxpayers, with which Commission disagrees. The Staff position is contrary to law and is beyond the authority of the Commission.

As discussed previously, Staff is erroneously asking the Commission to enter into the realm of City budgeting and the expenditure of franchise fees and tax revenues. The City could specifically allocate franchise fees collected from United Water or Idaho Power or Intermountain Gas or Republic Waste Services to specific expenditures. However, to do so would be unnecessary, burdensome and serve no practical purpose. Staff was provided a copy of the City's fiscal year 2014 budget book and 2015 budget update (Response to Production Request No. 7) which show the valuable public services provided to the benefits of Boise's citizen ratepayers.

With regard to the franchise fees and expenditure of tax funds the Staff states that “Boise acknowledges that it is the discretion of the City Council to determine if a savings achieved by

hydrant transfers to the General Fund will result in a tax reduction, a deferred tax increase or a re-allocation of the resources to fire protection or other resources.” (Staff Comments p. 9) The City not only acknowledges that point, the City emphasizes it. The expenditure of General Fund monies including franchise fees and tax revenues is in the discretion of the Boise City Council after public hearings and an extensive budgeting process. The City would ask the Commission to acknowledge the powers of the City Council and defer to their discretion with regard to the expenditure of franchise fees and other City General Fund revenues.

7. The Agreement provides at least equivalent benefits and costs to United Water Ratepayers.

The benefits of this Agreement to the Boise citizen ratepayers are well documented. Staff does not disagree that transfer will provide a more efficient water and fire protection system.

It is important to put the cost of the Agreement in perspective using the numbers provided by Staff. Staff points out that the initial cost to the average customer is \$0.24 per bi-monthly bill or \$1.45 per year. From another perspective, using Staff’s net present value analysis, a similar calculation can be performed. Staff states that the net present value cost over an 80-year period is \$118 per customer. If this is broken down to a monthly calculation [$\$118 / (80 \text{ years} * 12 \text{ months/year})$] the cost is 12 cents per month. This amount seems nominal. Certainly the amount of benefit the ratepayer derives from having an integrated system is at least 12 cents per month.

Conclusion:

UWI and the City have presented considerable evidence that the Application, seeking approval of the proposed Agreement transferring fire hydrant ownership, will provide the benefit of more efficient water and fire protection service to United Water ratepayers. UWI and the City have provided considerable evidence that the payment for the maintenance and replacement of hydrants by United Water ratepayers will put Boise ratepayers in an equitable position with other ratepayers in the United Water system and with ratepayers throughout the State of Idaho. UWI and the City have presented considerable evidence that the impact on ratepayers is minimal and at least commensurate with the benefits to be derived by those ratepayers. The City supports

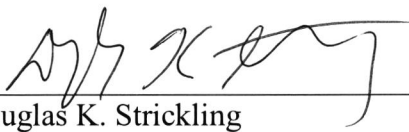
United Water's efforts to include gradually those minimal costs to the ratepayer in their water rates as proposed by the Agreement and Application. The lack of public comment on the proposal despite fairly extensive publicity, is strong evidence that the public and UWI ratepayers have no concern with the proposal.

Commission Staff comments present a thinly-veiled request for the Commission to overturn *Alpert* and rewrite Idaho Code §§ 50-329 and 50-329(A) to limit the collection of franchise fees from a franchised utility by a municipality and to regulate the expenditure of franchise fees by a municipality. The Commission should reject those arguments.

The City requests the Commission approve the Agreement and Application as proposed.

DATED this 13th day of August, 2015.

CITY OF BOISE CITY

By: 
Douglas K. Strickling
Attorney for City of Boise City

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2015, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, ID 83720-0074
jjewell@puc.state.id.us

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

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☐
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☐

Brandon Karpen
Deputy Attorney General
Idaho Public Utilities Commission
P.O. Box 83720
Boise, Idaho 83720-0074
Brandon.Karpen@puc.idaho.gov

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

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☐
☐
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☒

Dean J. Miller (ISB No. 1968)
McDEVITT & MILLER LLP
420 West Bannock Street
P.O. Box 2564-83701
Boise, ID 83702
joe@mcdevitt-miller.com

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

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BY: 

CITY OF BOISE CITY